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No. 83-1896

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,
vs.
JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF AND RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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I

INTRODUCTION

Barely eight months ago, this Court directed that state law business torts cannot masquerade as federal antitrust claims. *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984). It is difficult to imagine a decision which violates the *Copperweld* mandate more than the Ninth Circuit's decision here. Following its own precedent of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.) *cert. denied*, 377 U.S. 993 (1964) — a decision contrary to the law of this court and every other circuit — the Ninth

Circuit has held Petitioner Mobil Oil Corporation liable for *attempting* to monopolize where, if successful, Mobil could not be held liable for *actual* monopoly. Thus, the masquerade is evident: Mobil will suffer treble damages for no possible antitrust attempted monopoly.

The United States, as *amicus curiae*, agrees that the anomalous Ninth Circuit *Lessig* rule is "obviously erroneous." Amicus Brief at 16. In nevertheless suggesting that this Court deny *certiorari*, the United States misconstrues the Ninth Circuit's decision. No alternative ground to *Lessig* supports the Ninth Circuit's ruling. The Ninth Circuit did *not*, as intimated by the United States, uphold the relevant market finding of the jury; instead that court declined to rule on whether the submarket was one which had economic reality — as every relevant submarket must — because "it is clear that the jury's attempted monopolization finding may be sustained under *Lessig* ..." (Pet., App. A-11.). The United States ignores the plain words of the Ninth Circuit: that it affirmed *only* on the basis of *Lessig*.

Moreover, the United States is all too sanguine that the Ninth Circuit itself will reform the *Lessig* doctrine. It did not do so in this case. Nor will the *Copperweld* decision bind the Ninth Circuit to do so; indeed, denial of *certiorari* will convey the clear message that, despite *Copperweld*, *Lessig* retains its vitality.

II

WITHOUT REVIEW AND REMAND OR REVERSAL, THE LESSIG RULE WILL CONTINUE TO PLAGUE NINTH CIRCUIT LITIGANTS

A. The Obvious Error of Lessig

Before addressing those points on which the United States parts company with Mobil, it is instructive to survey those substantial points with which the Government agrees:

• The United States concedes, in its brief as *Amicus Curiae*, that the Ninth Circuit's anomalous *Lessig* doctrine misapplies the decisions of this Court which require an antitrust plaintiff to demonstrate a dangerous probability of successful monopolization of a relevant market in order to establish attempt to monopolize. *Amicus* Brief, pp. 7-8.

• The United States agrees with Mobil that the *Lessig* rule is in effect merely a Ninth Circuit attempt to create a general business tort "masquerading" as an antitrust claim, but which in fact is designed to punish unilateral business conduct without reference to its impact upon competition. *Amicus* Brief, pp. 5-6.

• The United States correctly notes that there is no "economic justification" for *Lessig's* abolition of the dangerous probability requirement. *Amicus* Brief, p. 7.

• The United States observes the Ninth Circuit's isolation from all other circuits and the confusion the *Lessig* rule engenders even among different Ninth Circuit panels. *Amicus* Brief, pp. 3-5, 17 n.22.

• The United States recognizes that *Lessig* may continue to cause serious adverse effects. *Amicus* Brief, pp. 17.

B. Certiorari Should be Granted Despite the Government's Attempts to Minimize Lessig

In the face of its recognition that *Lessig* is "obviously erroneous," the United States suggests *certiorari* denial for unusual reasons. In part, the United States argues that there is little danger of the *Lessig* disease spreading, because other circuits seem to be immune. *Amicus* Brief, p. 16. But this does not remove the injustice of an anomalous rule which unfairly burdens Ninth Circuit litigants with unnecessary and economically unjustified federal antitrust suits. The purpose of *certiorari* is to restore harmony among the circuits and ensure that the lower courts act consistently with this court. The Government in effect

advocates that the disharmony it acknowledges here should be continued rather than corrected.

The Government also argues that *Lessig* need not be confronted because it is seldom the only theory upon which a plaintiff proceeds. This, however, does not diminish the possibility of confusion: it increases it. The mischief of *Lessig* is to take a simple case — e.g., of tying, for which damages are easily assessed — and create artificial complexity, thereby allowing liability for attempted monopoly where it would not otherwise exist. Among other things, this tactic wrongly increases awards, as it did here.

Finally the Government's speculation that some day the Ninth Circuit may meet *en banc* to destroy its troublesome brainchild (*Amicus* Brief, pp. 17-18) is naive; the Ninth Circuit consistently has refused to do so for *twenty* years, including refusing to do so here. Indeed, this Court recently rejected the Government's overly optimistic view of another questionable Ninth Circuit antitrust rule when it granted *certiorari* in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* (No. 83-1368). Mobil respectfully submits a similar course is appropriate here.

C. This Case Clearly and Directly Presents the Lessig Issue for Review

Notwithstanding its condemnation of *Lessig*, the United States declines to recommend review in this case because it believes an alternative basis of decision was suggested by the Ninth Circuit's statements that "a jury's finding of a relevant market cannot be disturbed unless it is clearly erroneous," and that "Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding." Appendix to Petition, A-10, A-11. Contrary to the position of the United States, the Ninth Circuit then went on to expressly ground its decision on *Lessig*, and did *not* uphold the jury's finding. (Pet., App. A-11). The

jury's finding thus went unreviewed precisely *because* of *Lessig* and was not an alternative ground for the Ninth Circuit's decision. Moreover, the jury's finding *could not* have furnished an alternative ground for decision, for the cases recognize that a relevant market must have economic reality — and that this one did not.

A market is relevant if its domination gives the successful monopolist ability to control competition and fix prices. If interchangeable, substitute products exist, monopoly power does not. This is the economic reality of the marketplace. It is the burden of an antitrust plaintiff to prove the relevant market as an element of his case.

Here, as was repeatedly pointed out in Mobil's briefs on appeal, Respondents adduced *no evidence* to show that Mobil's TBA&S and other automotive products were not interchangeable with products manufactured and/or sold by other, competing manufacturers. *See, e.g.*, Mobil's Opening Brief, pp. 5, 15-16. Factually, therefore, this case is indistinguishable from *Lessig*. There too, the Ninth Circuit was confronted with a market defined without regard to competition, monopoly power, or economic reality. Tidewater, even if it had succeeded in "monopolizing" sales of TBA to its dealers, would not have had monopoly power to fix prices because of the competition faced by those dealers from others selling fungible products. To escape this impasse and to punish the unilateral business conduct of defendant, the Ninth Circuit ruled, by fiat, that relevant market was irrelevant in attempt cases. Absent the *Lessig* rule, the same impasse is presented here.

Respondents never claimed that they produced evidence of absence of product interchangeability. Instead, respondents believe that if Mobil treats its dealers as a "captive market," those dealers can constitute a relevant market for antitrust purposes *without any reference to impact upon competition*. Therefore, the only evidence respondents introduced regarding the existence of a submarket was

evidence as to how Mobil viewed or treated its dealers. Mobil asserted to the Ninth Circuit that such a submarket cannot be a relevant market because it fails to account for competing products which prevent Mobil from controlling competition or fixing prices, *i.e.* such a submarket lacks economic reality. The submarket for which respondents contended makes no reference to potential injury to competition, contrary to controlling case law.[1]

In short, respondents produced no evidence of product uniqueness, which they were required to produce as part of their burden. *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975) *cert. denied*, 424 U.S. 934 (1976); *L.A. Draper & Son v. Wheelbrator-Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984); *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). It is here that the United States misconstrues the Ninth Circuit's passing reference, that "Mobil pointed to nothing" in the record rebutting respondents' asserted "submarket." Mobil pointed to nothing in the record because there was nothing in the record to point to. *No* evidence of product uniqueness was produced. How Mobil viewed its dealers is irrelevant for the purposes of the federal antitrust laws. What *is* involved in relevant market definition, as *du Pont* and other decisions of this Court make clear, is drawing

[1]The United States makes much of the fact that the jury verdict "was not based on a *Lessig* theory." Amicus Brief, p. 12. Nevertheless the jury verdict was erroneous because it was unsupported by *any* evidence of product uniqueness and this verdict, lacking any foundation in economic reality, was *affirmed* only on the basis of *Lessig*. The United States also erroneously states Mobil "did not object to the court's failure to give additional instructions on market definition or attempt to monopolize." On the contrary, Mobil requested instructions which would have required the jury to consider product interchangeability. For example, Mobil's requested Instruction 98 stated: "The basic idea of a relevant market is that the products within it are interchangeable as a practical matter from the buyer's point of view."

the market to encompass competing products so that monopoly power, if achieved in such a market, could have an impact on competition. The relevant market for this analysis is the market in which the competitors' products compete.

Nor does the contention that a relevant market finding is factual obviate the necessity for a reviewing court to assure itself that such a market has economic reality. As noted by the very authority cited by the Ninth Circuit in the passage singled out by the Government:

> "Although the search for a relevant market is *basically* a factual inquiry, it deserves noting that the District Court also properly followed precedent in this area by restricting the relevant market to *one wherein a commercial reality exists.*"
>
> *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir.), *cert. denied* 459 U.S. 1009 (1982). (emphasis added).

Such a requirement is deeply ingrained in federal antitrust laws. Indeed, *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962) is premised on this requirement. Attempts to define a relevant submarket in terms which have no economic reality have been rejected by virtually every court which has had occasion to consider the precise issue. For example, in the automotive industry, attempts to limit relevant market to a submarket consisting of the products distributed by one manufacturer have consistently failed.[2] Citing *Packard Motor Car Co. v. Webster Motor*

[2]The Government, without distinguishing these automotive products cases, argues they rely on "factual" determinations, and thus, establish no legal limits to what may or may not constitute a relevant market. We note first that the *absence* of interchangeability evidence was the basis for many of these cases, as it was also for Mobil's appeal. Second, these cases stand for the obvious proposition that there must be some rational *limit* to the jury's discretion.

Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), and *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F.Supp. 453 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3d Cir. 1969), the court in *Mogul v. General Motors Corp.*, 391 F.Supp. 1305, 1313 (E.D. Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976), rejected the plaintiff's contentions that Cadillac could be used as a relevant product market by itself, stating:

> "In the instant case, I may, and do, take judicial notice that the relevant product market cannot be limited to Cadillac. The Cadillac is interchangeable with other luxury automobiles on the market which serve the same purpose and, in addition, it competes with even the less expensive models of automobiles in serving the consuming public's transportation needs and desires. Cadillac division of G.M.C. has neither the power to fix prices, nor the power to exclude competition from manufacturers of other luxury automobiles or of all other types of automobiles in the relevant market." 391 F.Supp. at 1313.

Of course, the ability to exclude competition and fix prices referred to in this court's opinion is the market power definition enunciated by this Court in *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Automotive cases in accord with the *Mogul* decision abound.[3]

The proper analysis is the same in the petroleum industry. In *Mullis v. ARCO Petroleum Co.*, 502 F.2d 290

[3] *See, e.g., Packard Motor Co. v. Webster Motor Car Co., supra; Mount Lebanon Motors Inc., Co. v. Chrysler Corp., supra; Merit Motors, Inc. v. Chrysler*, 417 F.Supp. 263 (D.D.C. 1976), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F.Supp. 110 (E.D.N.Y. 1976); *McDaniel v. General Motors Corp.*, 480 F.Supp. 666 (E.D.N.Y. 1979), *aff'd*, 628 F.2d 1345 (2d Cir. 1980); *Kemwel Automotive Corp. v. Ford Motor Co.*, 1966 Trade Cases ¶71-882 (S.D.N.Y. 1966).

(7th Cir. 1974), the Seventh Circuit reversed a district court injunction enjoining defendant from refusing to furnish petroleum products to the plaintiff distributor. Rejecting the plaintiff's contention that the relevant market was limited to petroleum products distributed by ARCO, the court noted:

> "That assumption is not supported by the evidence but is, in fact, contradicted by it. Plaintiff offered no evidence to prove that there are any legal or economic barriers to competition from areas immediately adjacent to Lawrence County. *More significantly, there is no proof that ARCO products are in a way different from other brands of petroleum products available in Lawrence County.* Even if we were to assume, without proof, that ARCO's gasoline or fuel oil is not a standardized commodity, either because of physical characteristics of the product or because advertising has enhanced its consumer acceptance, there is no evidence indicating the extent of its differentiation from other brands or the competitive significance of any such possible differentiation. The only relevant evidence in the record proves that ARCO products are in active competition with other brands. Under the kind of economic analysis employed by both the majority and dissent in *United States v. E. I. du Pont de Nemours*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed 1264, plaintiff clearly failed to prove that sales of ARCO petroleum products in Lawrence County, Indiana, constitutes a relevant market." 502 F.2d at 296 (footnotes omitted) (emphasis added).

In contrast to these authorities, the submarket identified by respondents could characterize a completely legal distribution system. A hypothetical situation illustrates this fact. If all aspects of the manufacturer-dealer relationship were identical to those argued by respondents

herein, but there was only one Mobil dealer in the entire Seattle area, under respondents' analysis, the same result must apply: that single dealer constitutes a relevant submarket which could be illegally monopolized. Yet under the authorities the sales to a lone dealer certainly could *not* constitute a relevant market where the dealer's ability to raise his prices is completely circumscribed by competition. Domination of sales to that dealer would have no impact whatever upon competition — which it is the goal of federal antitrust laws to protect.

The relevant market contended for by respondents was thus, as a matter of law, no relevant market at all. Had the Ninth Circuit affirmed on that basis, it would have been clear error, because no evidence of product interchangeability was produced to support the existence of such a market. Instead, however, the Ninth Circuit affirmed on the basis of *Lessig*, and *Lessig* alone — thereby presenting the *Lessig* issue squarely for review by this Court.

III

CONCLUSION

Certiorari should be granted.

Dated: March 4, 1985.

Respectfully submitted,

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